

No. 2962

IN THE

# United States Circuit Court of Appeals

## For the Ninth Circuit

THE UNITED STATES OF AMERICA,  
*Plaintiff in Error,*  
*vs.*

SNOHOMISH RIVER BOOM COMPANY,  
a corporation, and EVERETT  
IMPROVEMENT COMPANY, a corpo-  
ration,  
*Defendants in Error.*

UPON WRIT OF ERROR TO THE UNITED  
STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF  
WASHINGTON, NORTHERN  
DIVISION.

HON. JEREMIAH NETERER, *Judge.*

## Brief of Plaintiff in Error

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**Brief of Plaintiff in Error**

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STATEMENT OF THE CASE.

This action is one in ejectment brought by the United States to recover possession of a triangular strip of tide-land at the mouth of Ebey Slough in the waters adjacent to a part of the Tulalip Indian

—first, the true location of the southeastern boundary of the Tulalip Indian Reservation in that portion of it which locates and definitely fixes the mouth of Ebey Slough; and second, even though the land in suit is found to lie outside the reservation boundary, is it a part of the reservation by reason of being accretion lands attached to the upland.

In this connection it should be noted that the court found that the land in question was detached and separated from the adjoining main land by a deep-water channel

## ASSIGNMENTS OF ERROR.

### I.

The Court erred in granting the motion of defendants for a dismissal of said cause for the reason that judgment should have been rendered for the plaintiff upon all the evidence in the cause.

### II.

The Court erred in holding that the lands described in the complaint title and possession to which were sought in the present action were not a part of the Tulalip Indian Reservation.

## III.

The Court erred in holding that the mouth of Ebey Slough as determined and fixed by the United States engineers in the course of the reservation survey controlled and fixed the mouth of said Ebey Slough.

## IV.

The Court erred in holding that the lands in question was tide-land which was not a part of the Indian reservation.

## V.

The Court erred in not entering judgment in favor of the plaintiff upon all the evidence in the case according to the prayer of the complaint.

## VI.

The Court erred in dismissing said cause.

## ARGUMENT.

The government's contention in this case is that the triangular strip of land in issue in this case is a part of the Tulalip Indian Reservation and as such never vested in the state of Washington and therefore a title deraigned from the state would be null and void and the defendants would



be liable in ejectment.

The first question which arises is; did the court err in holding that the southeastern boundary of the reservation followed the sinuosities of the shore line north to the point arbitrarily designated by the surveyor as the mouth of Ebey Slough?

The government contends that Ebey Slough continues south far enough to include this triangular piece of tide-land. The court has fixed the mouth at the cross point on the diagram (see page 18, transcript) far inside the slough and opposite the narrow mouth of Kwilt-Cedar Creek, whereas the slough widens in its course south and really extends to the land in issue. If the court should agree with the plaintiff in error in its contention that the southeastern boundary of the reservation is not at the point fixed by the court but follows in a straight line to the point of beginning across the broad open mouth of the slough from the most southern tip of the reservation land, then the court must as a consequence hold that the land in issue which as a physical fact lies inside the reservation line contended for, is a part of the Tulalip Indian

Reservation. If, on the other hand, this court should agree with the lower court in its finding respecting the reservation line, the further question arises, viz., does it follow as a matter of law that a detached sand bar separated from the mainland by a narrow channel but immediately adjacent thereto is not such tide-land as becomes a part of the reservation?

#### POINT ONE.

The reservation line referred to should extend from the southernmost tip of the reservation in a straight line to the point of beginning across the broad mouth of the slough.

President Grant by executive order, December 23, 1873, fixed the boundaries of the Tulalip Reservation pursuant to the treaty of 1855 as follows:

“Beginning at low water mark on the north shore of Steamboat Slough at a point where the section line between sections thirty-two and thirty-three of township twenty north, range five east, intersects the same; thence north \* \* \* ; thence west \* \* \* to low water mark on the shore of Port Susan; thence southeasterly with the line of low water mark along said shore to the shores of Tulalip Bay

and Port Gardner with all the meanders thereof, and across the mouth of Ebey's Slough to the place of beginning."

Reference to plaintiff's Exhibit I shows that the southerly boundary of the reservation extends to the most southerly part of the reservation, to wit, Priest Point, before coming to the next call, which is, "*and across the mouth of Ebey's Slough to the place of beginning.*"

Why then should the court follow the arbitrary course of the surveyor and go inland with the sinuosities of the shore far up into the slough across the Kwilt-Cedar creek to the arbitrary point selected by the surveyor as the slough mouth?

The evidence shows that the original survey of the reservation was commenced on the 6th day of August, 1873, and continued until May 22, 1874. (See Surveyor-General Fitz-Henry's testimony at page 39 of Transcript.)

The President's proclamation was not made until December of 1873. It was evidently the purpose of the Indian Office to have the survey work well advanced before submitting the proclamation



to the President for signature.

Mr. Fitz-Henry was then asked:

“Q. Do you know and have you examined the records to ascertain whether this survey which was actually made followed the call of the presidential proclamation establishing the reservation?

“A. The east and north boundary was surveyed and monumented according to the proclamation, but that portion of the boundary line bordering on the Sound, or the salt water was never monumented. The meander line was surveyed along mean high-water line for the purpose of ascertaining the area of the fractional lots bordering on salt water.”

Transcript, p. 39.

And again, Mr. Fitz-Henry after stating that a supplemental map and survey showing the boundaries of the Indian Agency were made on June 24, 1874, was asked:

“Q. Now referring to the survey of 1874, does that in any way attempt to locate the south and west line of the reservation along salt water?

A. No, sir. That survey, according to the proclamation, or the boundary line according

to the proclamation, was never made or attempted to be made. The only survey along the water front was made to determine the area of the fractional lots.”

Transcript, p. 40.

And again the same witness was asked:

“Q. And the survey of 1903 and 1904 you refer to the lines of the reservation there?

A. That refers to the agency on Tulalip Bay and the north and east boundary which was monumented. There has never been any attempt on the part of the government to monument the boundary along the water front.

Q. So that the surveys of 1903 and 1904 re-set, and re-establish the east and north line of the reservation?

A. Yes, sir.

Q. And no effort was made to outline the land below the high-water mark or to change the meander line originally made?

A. No, sir.

Q. Mr. Fitz-Henry, have there been any other surveys excepting the three you have testified to?

A. No, those are the only surveys that have

been made. That is what my office records show.

Q. And in the surveys thus made only one of them, the original survey, had anything to do with the meander line?

A. The original survey surveyed the meanders of mean high-water line along the water front.

Q. How do you explain the fact that the meander line of the first survey followed the sinuosities of the shore of Ebey Slough away up inside the mouth and beyond the mouth? (Transcript, p. 41.)

A. That meander line was run to determine the area of the upland portion of the reservation and to separate the water survey from the land survey.

Q. And without regard to the actual call of the reservation?

A. No, sir.

Q. Mr. Fitz-Henry, where would the line in your judgment, following the call of the reservation, where would that line be?

(Objection and argument.)

THE COURT: He may state where he believes the line of low-water mark would be.

Q. (MR. MARTIN): Just outline it, Mr.

Fitz-Henry.

A. It would be impossible to follow the survey all the way around here. To determine the low water line would require a system of soundings and markings by buoys. You would have to survey along the high-water line. Otherwise it would take a year or more to determine that and mark it at low water, so there has been no attempt on the part of the Government (Transcript, p. 42) to monument the low-water line.

\* \* \* \* \*

Q. The surveys made by your office are along the line of mean high water?

A. Yes, sir, the meander line was of the mean high water; that we have was made for determining the area of the upland portion of the reservation for allotment purposes." (Transcript, p. 43.)

At this point the expert engineer and Surveyor General was asked his opinion whether the meander line referred to was the proper boundary line of the reservation. This question was disallowed on objection, although it would seem to be a mixed question of law and of technical fact, the expert answer to which would enlighten the court. It

would have served to distinguish between a boundary line conforming to the calls of the proclamation establishing the reservation, and an arbitrary engineer's line projected for the purpose of computing upland area, probably a base line for other work.

The witness was then asked:

“Q. What reference is made to the mouth of Ebey Slough in the field notes?

A. In meandering the high-water line there is a little designation by the surveyor where the mouth of Ebey Slough is.” (Transcript, pp. 43-44.)

\* \* \* \* \*

“Q. Will you take this map and mark those two courses and distances where the surveyor goes beyond the mouth of Ebey Slough.

A. He continues on up across the reservation to meander that line. That is the course right there (indicating on the map) and that is the point right there.

Q. The language on the plat, ‘Mouth of Ebey Slough according to meander notes of United States Government,’ that is the point?

A. Yes, sir, that is the point right there.”



(Transcript, p. 45.)

\* \* \* \* \*

“Q. And that meander of Ebey Slough does not pretend to conform to the low-water line or at any point along the shore.

A. No.

Q. Is there any reference other than you have already mentioned as to the location of the mouth of Ebey Slough in the surveys?

A. No, there has never been any monument. There is no place designated by a monument as Ebey Slough.” (Transcript, p. 46.)

It will thus be seen that the presidential proclamation was not followed in the surveys. The first survey commenced three months before the reservation was established and continued into 1874. The east line running north and south and the north line running east and west were run according to the calls of the proclamation. The water boundaries were fixed by the proclamation as the line of low-water mark on the shores of Port Susan and then we have for the next call,

“Then southeasterly with the line of low-water mark along said shore and the shores of Tulalip Bay and Port Gardner, with all the

meanders thereof, and *across the mouth of Ebey Slough to the place of beginning.*”

There was no attempt to establish the water boundary. Certainly a high-water meander shore line is not the same as the line marking mean low tide.

Meander is defined in the Standard Dictionary as, “to wind about, turn or flow around, to survey roughly, to wind and turn while proceeding in a course.”

Nothing is said of proceeding by the meanders of the slough to any arbitrary point. The language particularly calls for the reservation line to follow low-water mark up into Tulalip Bay and Port Gardner and then as if the necessity for observing the sinuosities, indentation or irregularities of the shore line were at end, recites:

“And across the mouth of Ebey Slough to the place of beginning.”

Evidently the proclamation as drawn contemplated that the mouth of Ebey Slough was immediately at hand so that the line when it left Priest Point (the most southerly point of land before you enter

the slough) would immediately strike out across the broad open mouth of the slough to the point of beginning.

Plaintiff in error will concede that the court has to determine the mouth of Ebey Slough from the language of the proclamation. There is nothing in the language employed which requires the court to follow an arbitrary line, established solely for purpose of computing the area and fixing the location of allotments of upland. Neither is there any compelling reason why the surveyor's notation in his field notes should be followed to determine and fix the mouth of Ebey Slough. The testimony shows that the line marking the mouth of the slough was never monumented. The only reference to it was the X mark on the map taken from the field notes and this line as surveyed made no attempt to establish the reservation boundary.

The government contends that the question is a geographical one, viz., where is the mouth of a river or slough which reaches out and into a great bay or wide arm of the sea? Should the line of the sea into which the river flows and the line of the

mainland touching the sea on each side of the river or bay mouth be taken, or should one proceed inland along the shores of this arm of the sea or wide river mouth to a point where the river narrows sufficiently to be bridged or forded?

Reference to the drawing at page 18 of the Transcript and to the exhibit submitted with the record, will show that the construction contended for does no violence to reason, nor to the physical or geographical facts, whereas to proceed far inland across the mouth of Kwilt-Cedar Creek to an arbitrary point fixing the mouth of Ebey Slough does violence to both. No law which we could cite would be at all useful to the court under the circumstances. The court has for its legal guide the calls of the presidential proclamation and it must construe the same in a manner consistent with the intention of the framer of the Act. The plain words used indicate to the writer's mind a purpose to stop following the irregularities of the shore and to strike out boldly across the broad mouth of the slough without waiting for the surveyor to meander inland and select his own line.

If this court adopts the reasoning advanced and construes the call in question as projecting the boundary in a straight line across the broad area of water at the mouth of Ebey Slough where it enters the Sound, then the other contentions of plaintiff in error must be supported, viz., the triangular strip of land lies inside the reservation line and therefore is government land to which the State of Washington had not title. It then follows that ejectment will lie to recover the land as belonging to the Indian Reservation.

#### POINT TWO.

Should the court hold with the lower court as to the location of the boundary line at the point arbitrarily selected by the surveyor, there is still another question, viz., is the triangular strip of land in issue not a part of the reservation because of its tideland character without regard to the existence of a small deep water channel between it and the main land when the land and the channel were clearly caused by tidal action?

By the enabling act Washington was admitted on the condition of disclaiming title, control and



jurisdiction of Indian lands. In section one of article 26 of the State Constitution this provision of the enabling act was incorporated verbatim and in addition this further disclaimer was written, viz.:

“All title in and claim to all tide, swamp and overflowed lands patented by the United States, provided the same is not impeached by fraud.”

*Jones vs. Callvert*, 32 Wash. 610.

Treating the proclamation establishing the reservation as a grant by the general government to the Indian Department for the benefit of the Indians, did not the government intend to grant the adjoining tide lands? And conceding that it did, what then is the legal situation respecting a detached strip of tide land or sand bar which has been formed by the accumulation of silt due to changing tidal conditions?

This land was made by the mud and silt deposited by the slough and will undoubtedly in time become a part of the mainland, by process of accretion. It is only separated by a small channel, as a reference to the exhibit maps will show. On either

side of the mouth of Ebey Slough on the Sound, the reservation line by the proclamation runs to mean low water. This line when extended or projected across Ebey Slough would obviously include the triangular strip of land because by the calls of the proclamation, the southeasterly boundary line after emerging from Ebey Slough (assuming for the sake of argument that the lower court is right with reference to the mouth of Ebey Slough) continues easterly along the north shore of Steamboat Slough to the place of beginning. A straight line from Priest Point across this body of water, whatever its name, picks up the reservation boundary on the opposite shore and continues to the point of beginning.

Why, then, does not all the tide land on the easterly side of the slough extend westerly to low water at the channel edge between the triangular strip and Priest Point?

The government owns the tide lands adjacent to the reservation and did not part with them by admitting Washington as a state.

*Jones vs. Callvert, supra;*

*Schively vs. Bawlbby*, 152 U. S. 1;  
*United States vs. Winans*, 198 U. S. 371.

For these reasons it would seem that the government owns the land in suit because it is practically a part of the reservation tide lands. Finally we argue that the government owns this triangular strip of land because of its ownership of the lands opposite this land on each side of the slough as one of the attributes of riparian ownership, particularly when you consider the express disclaimers on the part of the state.

The owners of land bordering on navigable waters are entitled to any increase of the soil by accretion.

*New Orleans vs. United States*, 35 U. S. 662.

*Jones vs. Soulard*, 65 U. S. 41.

The owner of land on both sides of a river above tide waters owns the islands therein to the extent of the length of his lands opposite to them.

*Granger vs. Avery*, 64 Me. 292.

See also *McCullough vs. Wall*, 53 Am. Dec. 715, where it is said:

“But islands in rivers, like rocks (which are only small islands), fall under the same rules concerning ownership which apply to the soil covered by water. This proposition, which seems to have been established by a consideration of the instances of islands formed by alluvial deposits, embraces all islands, whether of recent formation or remote origin: 3 *Kent’s Com.* 427; 2 *Bla. Com.* 261; *Ingraham vs. Wilkinson*, 4 Pick. 269 (16 Am. Dec. 342); *Hargrave’s Law Tracts*, 5-36. If they have not been otherwise appropriated by some lawful means, they belong in severalty to the owners of land on each side of the stream, according to the line of division which would have existed if they had continued under water. An island lying on one side of the *filum aquae* belongs to the owner of the bank on that side if no opposing right to it has been lawfully acquired by another person. If it is situated so near the middle of the river that the original *filum aquae* passed through it, and no opposing right has been acquired, it belongs to the owners on the two banks, according to the original dividing line.”

See also case of *Freeman et al. vs. Bellegarde et al.* (Cal. 1895 Supreme Court). 41 Pac. 389, which holds that a boundary running to the mouth of a certain creek, thence ascending said creek

made the thread of the creek the boundary line, regardless of the last named courses and distances even though the creek was a tidal stream.

This case applies with striking force to the present case. It sustains our argument that the boundary line would be the center of the slough. It would seem to settle any doubt as to the title of accretion land lying within the mouth of this body of water.

These cases would seem to establish the right on the part of the government to the island formed between the two shores of Port Gardner Bay or Ebey Slough without regard to where the boundary line crosses the slough. Granting the defendant's contention that the boundary line follows the sinuosities of the shore line on its course to the arbitrary point selected by the surveyor, yet the line turns south on the opposite shore to a point immediately opposite Priest Point in a straight line before turning east along the north shore of "Steamboat Slough to the point of beginning."

The government originally had title to all of the land under navigable water, in trust for the



benefit of the people. It carved out of the public domain certain Indian lands which lay on each side of a navigable bay or slough mouth. The state of Washington disclaimed title to Indians' lands and to tide lands. The land in question was formed by alluvial accretions and lies between the shores or banks of the slough or bay within the bay mouth as established by a straight line laid squarely across it, whatever you may call this body of water.

Upon these considerations we believe the court erred in dismissing the case on motion for a nonsuit, for the maps, plat and location of the slough, and its approaches, as well as the location of the land in issue, clearly show it to be government land.

Respectfully submitted,

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